IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CHUCKWUDI PERRY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	1:10cv167 (JCC)
DAVID J. KAPPOS,	)	
Director of the U.S.	)	
Patent and Trademark Office,	)	
	)	
Defendant.	)	

M E M O R A N D U M O P I N I O N

This case is before the Court on a Motion to Dismiss Plaintiff Chuckwudi Perry's ("Plaintiff" or "Perry") Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) filed by David J. Kappos ("Defendant" or the "Government").[1] For the following reasons, the Court will deny Defendant's Motion.

I. Background

This case arises out of the termination of Plaintiff's employment as a patent examiner with the United States Patent & Trademark Office, an agency within the Department of Commerce ("USPTO" or the "Agency"). (Compl. ¶¶ 3, 9, 38.) Plaintiff alleges disability discrimination in violation of the

[1] When the briefs in this case were submitted, the case was improperly captioned "Chuckwudi Perry v. Gary Locke." [*See* Dkts. 6, 13, 14.] Upon motion of the Plaintiff, and by Order of the Court, the case caption has been corrected to "Chuckwudi Perry v. David Kappos." [Dkt. 15.]

Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* ("RA") (Count One) and retaliation in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-3(a) ("Title VII") (Count Two).

Plaintiff alleges that he has monocular vision (blindness in one eye) and an "undiagnosed but continuing degenerative eye disease" in his other eye. (Compl. ¶ 46.) Count One is premised on Plaintiff's contention that Defendant failed to provide the "reasonable accommodation of a flexible schedule," which he alleges would have allowed him to seek treatment for his vision. (Compl. ¶¶ 49-55.) Count Two is premised on Plaintiff's contention that his supervisor at the USPTO "initiated a sequence of actions to attempt to justify Mr. Perry's dismissal" in response to Perry filing "an informal complaint of discrimination" regarding a disagreement he had with the Human Resources Department at the USPTO. (Compl. ¶¶ 61-64.)

In its Motion to Dismiss, the Government argues that "the plaintiff, having failed and refused to carry out his obligations in the administrative [discovery] phase of the [United States Equal Employment Opportunity Commission ("EEOC")] process, has failed to exhaust his administrative remedies; [and] such exhaustion is a prerequisite to pursuit of this action in this Court." (Def.'s Memorandum in Support of its

Motion to Dismiss ("Mem.") at 1.) The parties, however, disagree sharply about Plaintiff's level of cooperation in the administrative discovery phase of the EEOC process, and both parties rely entirely on the exhibits to their briefs, rather than the allegations in the Complaint, for factual support for their arguments.

Plaintiff, assisted by counsel, initiated the EEOC process on June 18, 2007. (Mem. Ex. 1 (EEOC Counselor's Inquiry Report) at 1.)[2] The Plaintiff's formal complaint of discrimination is dated August 2, 2007. (Mem. Ex. 2 (Complaint of Employment Discrimination).) The formal complaint was received by the USPTO's EEOC Officer on August 13, 2007, and it was accepted for investigation in part and dismissed in part on September 17, 2007. (Mem. Ex. 3 (September 17, 2007 letter from the USPTO's Office of Civil Rights to Plaintiff's then-attorney, Morris E. Fisher, Esq.).)

Following USPTO's acceptance of the complaint, Plaintiff was in contact with EEO investigator James Hubbard ("Hubbard"), a government contractor. (*See* Mem. Ex. 4 (Report of Investigation) at 1; Plaintiff's Opposition to Mem. ("Opp.") Ex. A (Declaration of Chuckwudi Perry) ¶ 4.) Plaintiff avers

[2] In ruling on a Federal Rule of Civil Procedure Rule 12(b)(1) Motion to Dismiss, a District Court may "look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Virginia v. United States*, 926 F. Supp. 537, 540 (E.D. Va. 1995).

that, in October and November of 2007, he requested his "first counsel" to "coordinate a date on which [the attorney] could attend a meeting with Mr. Hubbard and [Plaintiff]." (Ex. 4 ¶ 5.) After the attorney failed to do so, Plaintiff avers that he fired the attorney and retained his second counsel, Lee Boothby ("Boothby"). (Opp. Ex. A ¶¶ 5-6.) Plaintiff further avers that, in December of 2007, Hubbard "changed direction" and asked Plaintiff to respond to "written questions" and the statements made in draft affidavits of three USPTO employees "in writing." (Opp. Ex. A ¶ 6.)

On January 10, 2008, having received no response from Plaintiff, Hubbard sent a letter to Boothby "reintroducing himself" and providing Plaintiff with a "list of interrogatories." (Reply Memorandum in Support of Def.'s Mot. to Dismiss ("Reply") Ex. 1 at 1.) Hubbard also emailed the letter and interrogatories to "leeboothby@aol.com" and "chuckp619@comcase.net."[3] (Reply Ex. 1 at 4.) Hubbard's letter asked that Boothby "please acknowledge receipt of [the] correspondence" and that Hubbard wished Boothby to have Perry "respond [to the letter] within 15 days of receipt." (Reply Ex. 1 at 1.) Additionally, the email to Boothby stated that Hubbard was "interested in having Mr. Perry respond to the Interrogatories attached to this correspondence within 15 days

[3] There is no evidence before the Court that would confirm or dispute that these email addresses are those of attorney Boothby or Plaintiff.

of receipt of e-mail; however, if [Plaintiff] is available to meet with [him] in person, please arrange a location and a specific date, and I will meet with him in your presence." (Reply Ex. 1 at 4.) Boothby's office acknowledged receipt of the January 10, 2008 letter on January 14, 2008. (Reply Ex. 1 at 3.)

After the fifteen days had elapsed, on February 1, 2008, Hubbard issued his "Report of Investigation." (Mem. Ex. 4.) At that time, Plaintiff had failed to "provide sworn testimony requested from him and his current [legal] representative Lee Boothby." (Mem. Ex. 4 at 2.) Hubbard drafted the Report of Investigation based on, among other things, documentary evidence obtained from the USPTO and the "sworn testimony" of the "identified [Responsible Management Officials]." Plaintiff avers that he was not aware Hubbard was going to file his report on February 1; however, Perry makes no statement regarding the fifteen-day deadline imposed by Hubbard in his January 10, 2008 letter. (Opp. Ex A ¶ 9.) On February 5, 2008, Plaintiff submitted an "Affidavit" and "Rebuttal Statement" to Hubbard. (Mem. Ex. 5 at 2; Opp. Ex. A ¶ 8.) The Agency requested a Supplemental Report of Investigation to incorporate Plaintiff's February 5 submissions. (Mem. Ex. 5 at 2.) Hubbard filed this Supplemental Report on March 27, 2008. (Mem. Ex. 5 at 2.)

The Plaintiff sought a hearing before the EEOC, which appointed an Administrative Judge to hear and resolve the matter. During the discovery period before the EEOC, Plaintiff refused to provide a complete and unredacted copy of his medical records, as requested by the USPTO's representative, even after being compelled to do so by the Administrative Judge. (Mem. Ex 6 (April 1, 2009 Order of EEOC Administrative Judge Joel A. Kravetz) at 2.) Instead, Plaintiff removed portions of his medical records which showed his physician's description of his cooperation as "poor" and redacted the name and address of one of his treating physicians. (Mem. Ex. 6 at 2.) These redactions came to light on October 17, 2008, when Plaintiff, the day before he was set to be deposed by an Agency representative, produced un-redacted versions of many of his medical records. (Mem. Ex. 6 at 2.) Plaintiff attributes these redactions to "his former counsel." Plaintiff has further submitted a "corrected" version of the medical record to this Court, describing his cooperation as "normal."[4] (Opp. Ex. A at ¶ 13.)

According to the findings of fact made by the Administrative Judge, after rescheduling Plaintiff's deposition several times to accommodate Plaintiff's failure to provide timely discovery responses, Plaintiff arrived late to his

[4] This "former counsel" was Plaintiff's third attorney and was retained in July of 2008. (Mem. Ex. 6 at 3.)

deposition and was "immediately combative when responding to questions." (Mem. Ex. 6 at 4.) The Administrative Judge also found that Plaintiff was "evasive" and displayed a "lack of cooperation." (Mem. Ex. 6 at 4.) Plaintiff, on advice of counsel, ultimately terminated the deposition prior to its conclusion. (Mem. Ex. 6 at 4.)

By an Order dated April 1, 2009, and as a sanction for "the documented transgressions both before and during the hearing process," Administrative Judge dismissed the Plaintiff's request for a hearing and directed the USPTO to issue a Final Agency Decision ("FAD"). (Mem. Ex. 6 at 7.) Following the dismissal of the hearing request, the USPTO issued an FAD denying the Plaintiff's claims. (Mem. Ex. 7 (November 27, 2009 Decision of the EEOC denying Plaintiff's appeal of the Agency's dismissal of his EEOC complaint) at 1.) The FAD found that the complaint failed to establish a *prima facie* case of race, color, disability and reprisal discrimination, and that management had articulated legitimate, nondiscriminatory reasons for its action, which the complaint failed to show were a pretext. (Mem. Ex. 7 at 2.) The Plaintiff appealed the FAD to the EEOC's Office of Federal Operations ("OFO") and, on November 27, 2009, the OFO affirmed the FAD. (Mem. Ex. 7 at 1.)

This Complaint followed on February 23, 2010. [Dkt. 1.] On April 21, 2010, Defendant moved to dismiss the Complaint

for Plaintiff's failure to exhaust administrative remedies based on his lack of cooperation during the administrative discovery process. [Dkt. 6.] Plaintiff opposed this Motion on May 4, 2010 [Dkt. 13] and Defendant filed his Reply on May 7, 2010 [Dkt. 14]. This Court heard argument on the Motion on June 11, 2010. [Dkt. 16.] Defendant's Motion is now before the Court.

II. Standard of Review

Defendant's Motion seeks dismissal of Plaintiff's Complaint pursuant to both Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction, and Rule 12(b)(6) for failure to state a claim upon which relief can be granted. (*See* Mot. at 1.) The Fourth Circuit has held, however, that "failure by [a] plaintiff to exhaust [such] administrative remedies concerning a Title VII claim deprives the federal courts of subject matter jurisdiction over the claim." *Jones v. Calvert Group, Ltd.,* 551 F.3d 297, 300 (4th Cir. 2009). This Court will address Defendant's Motion under the standards of Rule 12(b)(1).[5]

[5] In addition to the Fourth Circuit's direction, the Court also notes that Defendant's Memorandum in support of its Motion relies entirely on facts that formed no part of the Complaint. Pursuant to Rule 12(d), if matters outside the pleadings are submitted in conjunction with, or in opposition to, a Rule 12(b)(6) motion, the court must either exclude such materials from consideration or convert the motion into a motion for summary judgment. Fed. R. Civ. P. 12(d). Neither party has asked this Court to convert this Motion to dismiss to one for summary judgment and Defendant's Motion and Memorandum offer no argument regarding dismissal under Rule 12(b)(6).

Pursuant to Rule 12(b)(1), a claim may be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Defendants may attack subject matter jurisdiction in one of two ways. First, defendants may contend that the complaint fails to allege facts upon which subject matter jurisdiction may be based. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *King v. Riverside Reg'l Med. Ctr.*, 211 F. Supp. 2d 779, 780 (E.D. Va. 2002). In such instances, all facts alleged in the complaint are presumed to be true. *Adams*, 697 F.2d at 1219; *Virginia v. United States*, 926 F. Supp. 537, 540 (E.D. Va. 1995). Alternatively, defendants may argue that the jurisdictional facts alleged in the complaint are untrue. *Adams*, 697 F.2d at 1219; *King*, 211 F. Supp. 2d at 780. In that situation, "the Court may 'look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists.'" *Virginia v. United States*, 926 F. Supp. at 540 (citing *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir. 1993)); *see also Adams*, 697 F.2d at 1219; *Ocean Breeze Festival Park, Inc. v. Reich*, 853 F. Supp. 906, 911 (E.D. Va. 1994); *Velasco v. Government of Indonesia,* 370 F.3d 393, 398 (4th Cir. 2004) (holding that "the district court may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding

to one for summary judgment"). In either circumstance, the burden of proving subject matter jurisdiction falls on the plaintiff. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Adams*, 697 F.2d at 1219; *Johnson v. Portfolio Recovery Associates,* 682 F.Supp. 2d 560, 566 (holding that "having filed this suit and thereby seeking to invoke the jurisdiction of the Court, Plaintiff bears the burden of proving that this Court has subject matter jurisdiction"). As the Defendant's Memorandum does not rely on any of the facts alleged in the Complaint, this Court assumes that Defendant refutes Plaintiff's allegation that he has "exhausted all his administrative remedies" and requests that this Court look beyond the allegations of the Complaint to make its determination. *See Virginia*, 926 F. Supp. at 540; (Compl. ¶ 43).

III. Analysis

In order to bring a civil suit against the federal government for Title VII violations, a federal employee-plaintiff must first exhaust his administrative remedies. *Brown v. General Services Administration*, 425 U.S. 820, 835 (1976); *Pueschel v. United States*, 369 F.3d 345, 353 (4th Cir. 2004). Title VII exhaustion requirements apply to cases brought under the RA. *See* 29 U.S.C. § 794a(a)(1); *Spence v. Straw*, 54 F.3d 196, 199-202 (3d Cir. 1995); *Doe v. Garrett*, 903 F.2d 1455,

1458-62 (11th Cir. 1990); *Plowman v. Cheney*, 714 F. Supp. 196, 198 (E.D. Va. 1989) (adjudicating an RA claim and holding that "among these Title VII remedies and procedures is an administrative claims procedure that is a prerequisite for seeking a judicial remedy"). As stated above, "[a] failure by the plaintiff to exhaust administrative remedies concerning a Title VII [and RA] claim deprives the federal courts of subject matter jurisdiction over the claim."[6] *Jones,* 551 F.3d at 301 (citing *Davis v. North Carolina Dep't of Corr.,* 48 F.3d 134, 138-40 (4th Cir. 1995) (holding that removal of Title VII action was improper because plaintiff's failure to exhaust administrative remedies deprived the federal courts of subject matter jurisdiction)). The exhaustion requirement "reflects a congressional intent to use administrative conciliation as the primary means of handling claims, thereby encouraging quicker, less formal, and less expensive resolution of disputes." *Chris v. Tenet*, 221 F.3d 648, 653 (4th Cir. 2000). The question upon

[6] The Fourth Circuit in *Jones* explicitly found that the case of *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385 (1982) is not to the contrary. In *Zipes,* "the Court held only that the *un-timeliness* of an administrative charge does not affect federal jurisdiction over a Title VII claim, *see Zipes,* 455 U.S. at 393, and *Davis* noted that the holding in *Zipes* was so limited, *see Davis,* 48 F.3d at 140." *Jones,* 551 F.3d at 301 n.2 (emphasis in the original). This is in accordance with the Fourth Circuit's opinion in *Edelman v. Lynchburg College*, 300 F.3d 400 (4th Cir. 2002), cited in Defendant's Reply. (Reply at 2 n.1.) In *Edelman,* the Fourth Circuit, citing *Zipes*, found that the "exhaustion issue" was "in fact 'a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.'" *Edelman*, 300 F.3d at 404 (citing *Zipes*, 455 U.S. at 393). In *Edelman*, as in *Zipes*, the "exhaustion issue" was one of timeliness; thus, the Fourth Circuit's *Jones* decision distinguishing *Zipes* applies equally to its holding in *Edelman*.

which Defendant's Motion turns therefore is whether or not Plaintiff has sufficiently "exhausted" his administrative remedies for this Court to have subject matter jurisdiction over his Title VII and RA claims. This Court finds that he has done so.

Defendant argues, in essence, that Plaintiff's failure to: (1) meet with the Agency investigator; (2) supply a sworn statement to the investigator prior to the filing of his Report of Investigation; (3) provide timely and complete copies of his medical records and to promptly and completely comply with the Administrative Judge's Order to compel such records; and (4) complete his deposition testimony, amounts to a frustration of the administrative process and constitutes a failure to "exhaust his administrative remedies." (Mem. at 7.) The parties agree that failure to participate in the administrative process may, in some instances, preclude a finding that administrative remedies have been exhausted. (*See* Opp. at 6.) What Plaintiff does dispute is both the Defendant's characterization of Plaintiff's cooperation during the administrative investigation and the Defendant's argument that such failure as alleged would constitute a failure to exhaust his remedies.

In support of its argument, Defendant first points to the regulations governing the administrative complaint process. (*See* Mem. at 5.) These regulations mandate that a complainant,

along with the Agency and its employees, "shall produce such documentary and testimonial evidence as the investigator deems necessary." 29 C.F.R. § 1614.108(c)(1). This evidence, when it includes statements by witnesses, "shall be made under oath or affirmation, or alternatively, by written statement under penalty of perjury." 29 C.F.R. § 1614.108(c)(2). These same regulations require the Agency to "develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint. An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred." 29 C.F.R. § 1614.108(c)(1). When a complainant fails to comply with these discovery procedures, the Administrative Judge is authorized to "issue a decision . . . in favor of the opposing party" and "take such other actions as appropriate." 29 C.F.R. § 1614.109(f)(3)(iv)-(v).

Defendant argues that Plaintiff did not fully comply with these regulations, and that such failure constitutes exhaustion. (Mem. at 7.) Defendant relies primarily on two cases in support of this argument. The first of these cases involves a discrimination action brought by two African-American employees at a naval facility. *Woodward v. Lehman*, 717 F.2d 909 (4th Cir. 1983). In *Woodward* after the plaintiffs initiated the EEOC process, the Commanding Officer "requested the plaintiffs

to provide written statements with specific illustrations of the alleged discrimination" to ensure that there was an "act of discrimination" in the requisite thirty days immediately preceding the filing of the administrative complaint.[7] *Id.* at 912-914. The plaintiffs in that case categorically refused to provide such details, independently stating that his or her "individual claim for racial discrimination is not based strictly on any single incident . . . but is rather based on the continuing discrimination against" him or her. *Id*. at 914. After receiving this refusal, the Commanding Officer "cancelled the charges for a failure to prosecute for failure to comply with this request for specification [of the date the claim accrued]." *Id.* The Fourth Circuit in that case reversed the District Court's finding of exhaustion and, in so doing, found that "the plaintiff[']s refus[al] to provide such information [] thereby frustrated administrative review of the merits of their claims" and thus the District Court "should have granted defendant's motion to dismiss for failure to exhaust administrative remedies." *Id.* at 915.

The second case on which Defendant primarily relies is the unpublished Fourth Circuit case of *Austin v. Winter*, 286 F.

[7] The regulation at issue in *Woodward* expressly requires that the agency may only consider a discrimination charge if the complaint "brought it to the attention of the Equal Employment Opportunity Counselor the matter causing him to believe he had been discriminated against within 30 calendar days [of bringing the complaint]. . ." 29 C.F.R. § 1613.214(a)(1).

Appx. 31 (4th Cir. 2008). In *Austin*, after the plaintiff filed a formal EEOC complaint, the defendant agency scheduled a fact finding conference pursuant to 29 C.F.R. § 1614.108(b). *Austin*, 286 F. Appx. at 36. The plaintiff then contacted the agency and stated that, while "she was not dropping the complaint, she would not participate in the fact finding conference . . . ." *Id.* at 34. The agency informed plaintiff that she had fifteen days to notify the agency of her intentions regarding her EEOC case or it would be dismissed; when she failed to respond, the agency dismissed the case. *Id.* The Fourth Circuit found that "though the [plaintiff] began the administrative process, the process was not complete until [plaintiff] fully participated in all required aspects of the investigation and the [agency] made a final decision on her claim." *Id.* at 36. Furthermore, the court held that "a 'complainant's failure to cooperate in the administrative process precludes exhaustion when it prevents the agency from making a determination on the merits." *Id.* (citing *Jasch v. Potter,* 302 F.3d 1092, 1094 (9th Cir. 2002)).

Defendant contends that Plaintiff's evasiveness and lack of cooperation during the discovery process are analogous to the failure to participate in the administrative process displayed by the plaintiffs in *Woodward and Austin*. Specifically, Defendant points to Plaintiff's failure to submit to a formal interview; failure to supply a sworn statement;

"interference with the fact-finding purpose of the administrative phase of the EEO[C] process" by withholding and redacting his medical records; "unjustifiable refus[al] to answer some questions" during his deposition; "evasiveness" in responding in others; and his ultimate termination of the deposition before its completion. (Mem. at 7.)

The cases of *Austin* and *Woodward* are distinguishable from the case at bar. The Fourth Circuit in *Austin* offered a limited holding, whereby a plaintiff's failure to participate in the administrative process will only constitute failure to exhaust administrative remedies if it "prevent[ed] the agency from making a determination on the merits." *Austin*, 286 Fed. Appx. at 36 (citing *Jasch*, 302 F.3d at 1094). Similarly, *Woodward* is limited to situations where "the complainant has failed, after due opportunity, to supply the agency with information sufficiently specific to enable it to conduct meaningful investigation and to determine whether the complaint satisfies the other regulations." *Woodward*, 717 F.2d at 916.

In this case, the Administrative Judge imposed a sanction on Plaintiff for his lack of cooperation during administrative discovery by dismissing Plaintiff's hearing request and remanding his claim to the Agency for "a Final Agency Decision consistent with 29 C.F.R. § 1614.110 based on the record as supplemented through the hearing process." (Mem.

Ex. 6 at 7.) Here, Plaintiff's conduct frustrated and slowed the investigation of his EEO complaint, yet it did not prevent the USPTO from making a determination on the merits. Furthermore, Plaintiff appealed the USPTO's decision and the EEOC denied his appeal and upheld the FAD, finding that "the complaint failed to establish a *prima facie* case of race, color, disability and reprisal discrimination, [and] management articulated legitimate, nondiscriminatory reasons for its action which complaint failed to show were a pretext." (Mem. Ex. 7 at 2.) The Plaintiff's case can be further distinguished from *Woodward* and A*ustin*, as the plaintiffs in those cases formally refused to participate in the discovery process, were given a definitive deadline by which to comply or have their case dismissed, and in neither case did the relevant agency reach a FAD. In the instant case, a decision on the merits was reached, appealed, and upheld, leaving Plaintiff no additional administrative recourse and exhausting his administrative remedies.[8]

[8] Additionally, the Plaintiff argues that the regulations in place governing the administrative discovery process, 29 C.F.R. § 1614.108, provide for various penalties for failing to comply and that "the regulations simply do not provide for the penalty that the Government seeks: to divest [Plaintiff] of his right to proceed in federal court." (Opp. at 11); s*ee* 29 C.F.R. § 1614.108(c)(3). The Administrative Judge sanctioned Plaintiff as a result of his discovery failures by dismissing his hearing request, the USPTO issued a decision based on the merits of Plaintiff's claim, and the EEOC considered and denied his appeal of that decision. Plaintiff argues that, based on the completed administrative disposition, the Court cannot find that Plaintiff

IV. Conclusion

For these reasons, the Court will deny Defendant's Motion to Dismiss. An appropriate Order will issue.

/s/
James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

June 28, 2010
Alexandria, Virginia

failed to exhaust his administrative remedies. The Court does not reach these arguments.